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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1032

HAMILTON NATIONAL BANK OF KNOXVILLE,
Executor of the Estate of John Edd Bradley,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Sixth Circuit.**

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The Hamilton National Bank of Knoxville, Executor of the Estate of John Edd Bradley, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above case on December 17, 1965.

## OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Tennessee, Northern Division, is reported at 229 F. Supp. 885. The opinion of the Court of Appeals for the Sixth Circuit has not been reported and is found in the Appendix.

## JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on December 17, 1965, and copy thereof is appended to this petition in the appendix, at pp. 11-28. The jurisdiction of this Court is invoked under U. S. C. 28, 1254 (1). This suit was instituted by the petitioner to recover federal estate taxes, with interest, alleged to have been overpaid by the petitioner as Executor of the Estate of John Edd Bradley, who died on March 10, 1961. The sole question before the District Court, and before the United States Court of Appeals on appeal by the Government, was whether year's support, provided by the laws of Tennessee for the surviving spouse, was a terminable interest within the meaning of Section 2056 of the Internal Revenue Code of 1954. The District Judge held that it was not, the Court of Appeals reversed.

## THE QUESTION PRESENTED.

The question presented is: Is the year's support provided by the laws of the State of Tennessee for a surviving spouse, whether the estate be intestate or whether the surviving spouse acquires the right to year's support under Tennessee law by dissenting from the deceased spouse's will in a testate estate, a defeasible interest within the meaning of Section 2056 of the Internal Revenue Code of 1954? In the instant case the question might

be narrowed to the latter of the foregoing alternatives, for, in fact, the surviving widow of the decedent, John Edd Bradley, dissented from his will, which made no provision at all for her, and was awarded year's support.

## STATEMENT.

This suit, instituted pursuant to the provisions of Title 28, U. S. C., Section 1346 (a) (1), was an action against the United States for the recovery of an Internal Revenue tax alleged to have been erroneously and illegally assessed and collected to the extent that it was excessive. Petitioner duly qualified as the Executor of the Estate of John Edd Bradley, who died testate in Knox County, Tennessee, on March 10, 1961. He was survived by his widow, who was his second wife, he having been formerly married but divorced. His will made no provision for the widow. She dissented from his will and by appropriate proceedings under Tennessee law was awarded year's support in the sum of $8,400, which the Executor claimed was entitled to marital deduction treatment pursuant to Section 2056 (a) of the Internal Revenue Code of 1954. The deduction was disallowed and a deficiency was paid to the Government of $1,548.78. It was the position of the Government that this year's support was a terminable interest within the meaning of Section 2056 (b) (1) of the Internal Revenue Code of 1954.

The parties, as well as the courts which have considered the matter, all agree that the question under consideration is to be determined by the law of the State of the decedent. The District Court held that under the laws of the State of Tennessee the year's support here under consideration was not defeasible. The opinion of the District Court was entered on March 3, 1964, and accordingly the opinion of this Honorable Court in Jackson v. U. S., 376 U. S. 503, could not have been noted by the

District Judge for it was not entered until March 23, 1964. The Court of Appeals, however, noting Jackson and concluding that the year's support herein involved was a defeasible interest, citing two old North Carolina cases and a decision of a District Court sitting in North Carolina applying North Carolina law, reversed the District Court.

## REASONS FOR GRANTING THE WRIT.

The decision below should be reversed because it erroneously interprets the law of Tennessee as it applies to the matter of year's support allowable to widows in intestate estates, or dissenting in testate estates, and we believe carried the decision in the Jackson case beyond the intent of this Court in that decision. Indeed, if the Court of Appeals for the Sixth Circuit is affirmed in the instant decision, it is inevitable that the Bureau of Internal Revenue will apply the result not only to year's support, but also to dower, homestead, and other statutory interests that widows in intestate estates acquire pursuant to Tennessee law.

We consider it an unnecessary prolongation of this petition to refer this Court to the many decisions of the various District Courts and Courts of Appeal that have considered the matter. The District Court in this case refers to many of the Tennessee cases, as well as to cases coming up to the United States Court of Appeals for the Sixth Circuit, particularly Dougherty v. U. S. (1961), 292 F. 2d 331, and some cases from the District Courts in Kentucky, as well as Michigan, Virginia and Illinois. Granted that all of these cases antedate Jackson. The Government, on the contrary, has relied most heavily on U. S. v. Edmondson, 331 F. 2d 676 (C. A. 5, 1964), wherein the U. S. Court of Appeals for the Fifth Circuit reversed its prior decision in U. S. v. First National Bank & Trust Company of Au-

gusta, 297 F. 2d 312 (C. A. 5), in a per curiam opinion following the decision in Jackson. Both of the foregoing cases were based on the probate law of the State of Georgia and it is to be noted that no petition for certiorari was filed with this Court in the Edmondson case.

We regard the subject of this petition as being of national importance though the immediate problem is simply that of one estate being administered in Tennessee. We say of national importance because the Revenue Code from which it arises was enacted in the first place to remove the inequality of taxation from so-called community property states and so-called common law states, the latter having suffered higher taxes under the applicable Internal Revenue Codes than the former. Practically all states east of the Mississippi River fall in the category of common law states.

We think for the purpose of this argument that an important immediate differentiation should be made in the classes of cases with which we are concerned. We would divide these classes as follows:

1. Community property states wherein by statute there are support provisions granted to widows in addition to the provision made for them by will of the deceased husband. It is into this category that Jackson falls.

2. Intestate estates in common law states.

3. Testate estates in common law states, where the will of the deceased spouse makes no provision for the surviving spouse and the surviving spouse dissents from the will and thereby achieves the position that a widow would have in Category 2 above. It is in this third category that the case at bar falls.

Preliminarily, we submit as our first proposition that Jackson should not necessarily be decisive of all cases

arising under Categories 2 and 3 above. Indeed, it should not **necessarily** be decisive of all cases arising under Category 1 above.

Generally speaking, in most of the Southern States, and certainly in the instance of Tennessee, there has been very little change in the statutory probate law over a period of 150 years. These statutes were enacted long before the conception of inheritance and estate taxation arose in American law. Their effect should be judged, we submit, in the light of their history. They were enacted to accord to widows generally a cloak of monetary protection during widowhood that was not ordinarily available to them otherwise. Therefore, the decision of the case at bar will affect widows in many of the States of the Union who find themselves in either Categories 2 or 3 above. Affirmance of the decision of the U. S. Court of Appeals for the Sixth Circuit would result in an increase in the impact of taxation on those estates generally of smaller dollar value, least able to bear it. It is no answer to this problem to say, as did this Court in Jackson:

> "The achievement of the purposes of the marital deduction is dependent to a great degree upon the careful drafting of wills; we have no fear that our decision today will prevent either the full utilization of the marital deduction or the proper support of widows during the pendency of an estate proceeding."

As we pointed out to the Court of Appeals for the Sixth Circuit, no amount of will draftmanship can deprive a widow of her right to dissent, and it is inevitable that she will dissent if no provision, or no adequate provision, is made for her in the will of her deceased husband. Therefore, the question is whether a widow who exercises her right to dissent under these circumstances is going to find herself penalized thereby taxwise. We do not believe this Court intended that result.

Tennessee law as considered in the opinion of the Court of Appeals should be reviewed at this point. Among other things, the Court in opinion refers to the Tennessee cases of Hamilton National Bank v. Haynes, 180 Tenn. 247 (1943); Pope v. Alexander, 194 Tenn. 146 (1952); and Pinkerton v. Turman, 196 Tenn. 448 (1953). It should be pointed out immediately that each of these cases involves a testate estate. In both Hamilton National Bank v. Haynes and Pope v. Alexander, substantial provision was made in the deceased spouses' wills for the surviving spouses. In each the surviving spouse died a short time after the death of the deceased spouse. In each the personal representative of the dying surviving spouse sought the instruction of the court pursuant to the provisions of TCA 31-611, as to whether to dissent from the will of the first dying spouse. In each the court held that where substantial provision was made in the will of the first dying spouse for the surviving spouse, dissent was not indicated and would not be instructed. We respectfully submit that none of these three Tennessee decisions bring up the crux of this problem, which is the matter of the year's support for a surviving widow provided for by Tennessee law.

The District Court, in a well reasoned opinion, closely analyzed the Tennessee cases and the Tennessee statutes. In all candor, we must hasten to say that there is no Tennessee case precisely upon the point of what disposition is to be made of homestead, dower, year's support, money on hand, crops and farm tools in an intestate estate where the widow dies during the period of administration. As we have noted earlier, the decisions in the testate estates involving TCA 31-611, are not in point to the problem here presented. On the other hand, TCA 31-611 makes manifest that the statutory law of Tennessee provides for the contingency of the death of a widow prior to exercising her right to dissent, and certainly con-

templates dissent after death in an appropriate situation. We urge the Court to consider that in any case where the deceased spouse's will makes no provision for the surviving widow, it is the statutory policy of Tennessee that her right to dissent be preserved. Furthermore, though as we have said, the precise question here raised has not been passed on by the Supreme Court of Tennessee, it is nevertheless, manifest from the decided cases which were so ably analyzed by the District Judge below, that the policy of Tennessee is to accord to the surviving widow all of her rights under the intestacy statutes, no matter how long after the death of her husband she survives. Viewed in this light, and the Court of Appeals cited no Tennessee case to the contrary, the interest here under consideration is not a defeasible interest under Tennessee law.

In Wachovia Bank & Trust Co. v. U. S., 234 F. Supp. 897 (D. C., N. C. 1964), referred to by the Court of Appeals in opinion, it is there said that under the law of North Carolina, the administrator is only under a duty to assign the year's allowance upon the written application of the widow, signed by her, and within one year from the decedent's death. The court goes on to say that if these requirements are not met there is no duty to assign the allowance, therefore it is terminable, and following the Jackson opinion, the court holds the widow's year's allowance is not part of the marital deduction. There apparently was no appeal of that case. That case, however, does point up the problem that has been stated in this petition. It is our insistence again that this Honorable Court did not intend that Jackson be carried so far. It is always argued by the Government that if there is enough dissatisfaction with the law in cases of this type, the relief sought should be at the hands of the Congress. One might well add that if the law is as some district courts and some appellate courts which have considered

the matter say, and which the Government contends it is, and Congress fails to grant relief, then the respective State Legislatures provide the only remaining source of correction. This multitude of State legislation altering their various probate statutes to avoid the result thus brought about by Jackson will again produce the turmoil that the marital deduction legislation sought to quiet. We do not believe that this Court intended to bring on this condition. Indeed, in the concluding sentence of the opinion in Jackson, so much is said.

If this Honorable Court accepts the assertion of counsel that the Tennessee cases and the Tennessee statutes in intestacy situations create nondefeasible interests in surviving widows, particularly the right to year's support, and accepts the further proposition that the general rule is to be followed in testate estates where the will makes no provision for the widow, then obviously, the decision of the Court of Appeals below is erroneous.

Even if, however, there be doubt as to Tennessee law, it is the further position of the petitioner that it was not the intention of this Court in the Jackson case to bring about the result that the petitioner is facing here. The solution to the difficulty is easily found. Were this Court to say that in intestate estates, as well as in testate estates where no provision is made in the will of the decedent for his widow and she has the statutory right to dissent, as applied to common law states, that the current statutory allowances for the surviving spouse are entitled to marital deduction treatment, this problem would thereby be eliminated immediately.

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted:

1. That this petition for a writ of certiorari should be granted.

2. That the judgment of the Court of Appeals should be reversed and the judgment of the District Court for the Eastern District of Tennessee should be reinstated and affirmed.

Respectfully submitted,

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## OPINION OF COURT OF APPEALS.

(Filed Dec. 17, 1965, Carl W. Reuss, Clerk.)

No. 16071.

United States Court of Appeals for the Sixth Circuit.

Hamilton National Bank of Knoxville, Executor of the Estate of John Edd Bradley,
Plaintiff-Appellee,
v.
United States of America,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Tennessee.

Decided December 17, 1965.

Before: Celebrezze, Circuit Judge, Connell* and Machrowicz**, District Judges.

Celebrezze, Circuit Judge. On March 19, 1961, John Bradley died testate, survived by his wife, Dora Bradley, and two minor children by a former marriage. On April 11, Dora Bradley filed her dissent from the will of her deceased husband. In conformity with T. C. A., Section 30-802, the widow then filed an application for a year's support. The amount of $8,400. was set apart as the widow's year's support. The executor of the estate of John Bradley filed a federal estate tax return. Included in the amount of the marital deduction from the gross estate of the decedent was the $8,400. year's support.

* Honorable James C. Connell, Chief Judge, United States District Court for the Northern District of Ohio, sitting by designation.

** Honorable Thaddeus M. Machrowicz, Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

This deduction was disallowed and deficiency of $1,548.78 was paid. In this suit to recover the assessment, the District Court, in its opinion reported in 229 F. Supp. 885 (1964), held the executor of the estate of John Bradley was entitled to a refund of federal estate taxes in the amount of $1,548.78. The United States appeals.

We are here concerned with the applicability of the marital deduction to the widow's year's support. The availability of the year's support to the surviving spouse under state law is not in doubt.

The sole question presented by this appeal is whether, under Tennessee law, a widow's interest in a statutory year's support constitutes a "terminable interest" within the purview of Section 2056 (a), (b) (1) of the 1954 Internal Revenue Code, and consequently fails to qualify for the marital deduction.

Section 2056 (a), (b) (1), 1954 Internal Revenue Code provides:

> "(a) Allowance of marital deduction.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.
>
> "(b) Limitation in the case of life estate or other terminable interest.
>
> "(1) General Rule. Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will termi-

nate or fail, no deduction shall be allowed under this section with respect to such interest * * *."

Congress has indicated that, other than the enumerated exceptions to the terminable interest rule, Section 2056 (a), (b) (1) was intended to be "all encompassing with respect to various kinds of contingencies and conditions". Sen. Rept. No. 1013 (Part 2) 80th Congress, 2d Sess., pg. 7.

The Supreme Court in **Jackson v. United States,** 376 U. S. 503 (1964), held that in order for the widow's allowance to qualify for the marital deduction, and thus escape the terminable interest limitation, the widow's interest in the year's support must be indefeasible and unconditional as of the moment of the decedent's death. The critical factor in applying the terminable interest rule is the possibility under state law of the failure of an interest rather than the actual failure. In most states, the widow's year's support is subject to a number of contingencies at the time of the husband's death, each of which may render the interest terminable.[1]

If under state law the right to receive the allowance terminates upon the occurrence of such contingencies as

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[1] There still remains an uncertainty as to how broadly the terminable interest provision will be defined. It has been suggested that the adoption of the date of death approach will eliminate almost all deductions for widow's allowances. **Landers v. Commissioner of Internal Revenue,** 38 T. C. 828 (1962); **Mertens, The Law of Federal Gift and Estate Taxation,** 1964 Cumulative Supplement, Section 29.27; 22 New York University Institute on Federal Taxation 1146 (1964); 63 Michigan Law Review 924 (1964-1965).

In **Jackson v. United States,** *supra,* the Court said:

> "We are mindful that the general goal of the marital deduction provisions was to achieve uniformity of federal estate tax impact between those States with community property laws and those without them. But the device of the marital deduction which Congress chose to achieve uniformity was knowingly hedged with limitations, including the terminable-interest rule. These provisions may be imperfect devices to achieve the desired end, but they are the means which Congress chose."

the death or remarriage of the widow, the widow's interest is terminable under Section 2056 (a), (b) (1). **Jackson v. United States,** *supra*; **Cunah's Estate v. Commissioner of Internal Revenue,** 279 F. 2d 292 (C. A. 9, 1960); **United States v. Quivey,** 292 F. 2d 252 (C. A. 8, 1961); **Darby v. Wiseman,** 323 F. 2d 792 (C. A. 10, 1963); **United States v. Edmondson,** 331 F. 2d 676 (C. A. 5, 1964); **The Second National Bank of New Haven v. United States,** 222 F. Supp. 446 (D. C., Conn. 1963).

Where the widow has an absolute right at the date of death to the year's support, and the right is not extinguished by death or remarriage, the following courts have held the widow's support is not a terminable interest. **Estate of Avery v. Commissioner of Internal Revenue,** 40 T. C. 392 (1963); **Rensenhouse v. Commissioner of Internal Revenue,** 31 T. C. 818 (1959); **Molner v. United States,** 175 F. Supp. 271 (D. C., Ill., 1959); and **Reynolds v. United States,** 189 F. Supp. 548 (D. C., Mich., 1960).

Many states, such as Tennessee, require the surviving spouse to dissent from the will and apply for the year's support before the widow is entitled to the year's support. The fact that a petition by the widow is a prerequisite to granting a widow's year's support has been held not to render the widow's interest terminable. **Rensenhouse v. Commissioner of Internal Revenue,** *supra*, and **Molner v. United States,** *supra*. In **Rensenhouse,** the Court said:

> "The invocation of the proper legal procedures is required with regard to widow's allowances in most jurisdictions, and if this were a relevant factor in considering the applicability of Section 812 (e) (1) (b) it would almost universally preclude the allowance as a marital deduction of amounts expended in accordance with the local law for support of the surviving spouse of the decedent."

Similar to the widow's dissent and application for the year's support is the widow's dissent and application for

compensation in lieu of dower. It has been uniformly held the compensation qualifies for the marital deduction, and invoking the necessary legal procedures to enforce the right is not a condition or contingency precedent to its existence. **United States v. Crosby**, 257 F. 2d 515 (C. A. 5, 1958); **Dougherty v. United States**, 292 F. 2d 331 (C. A. 6, 1961); **United States v. Hiles**, 318 F. 2d 561 (C. A. 5, 1963); **First National Bank of Roanoke v. United States**, 335 F. 2d 91 (C. A. 4, 1964); **Moore v. United States**, 63-2 U. S. T. C., Para. 12.156 (D. C., Ky., 1963); **Wachovia Bank and Trust Co. v. United States**, 234 F. Supp. 897 (D. C., N. C., 1964); Tax Regulations, Sec. 20.2056 (e)-2 (c).[2]

To hold that an interest is terminable only because legal procedures are invoked to enforce an interest which is otherwise vested at the date of the husband's death, is to hold that all elective rights, such as the widow's allowance and the statutory interest in lieu of dower, are disqualified as marital deductions.[3] However, this question need not be answered here for under Tennessee law, as we construe it, the widow does not have a vested right to the year's allowance at the date of her husband's death.

The applicable provisions of the Tennessee Code provide:

> "§ 30-802. Year's support set apart for widow and family. Upon the application of the widow of an intestate, or of a widow who dissents from her husband's

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[2] It is important to note that some state statutes provide that in the event the surviving spouse dies after the testator and before the time for dissent expires, the personal representative of the surviving spouse may make the dissent.

However, some states hold the right to dissent is personal to the surviving spouse and does not survive the death of the surviving spouse. Nevertheless, all the above cited cases hold the statutory interest in lieu of dower qualifies for the marital deduction.

[3] See footnote 1.

will, the county court shall appoint three (3) freeholders, unconnected with her either by consanguinity or affinity, who, being first duly sworn to act impartially, shall set apart so much of the crop, stock, provisions, moneys on hand or due, or other assets, as may be necessary for the support of such widow and her family until the expiration of one (1) year after the decease of her husband."

"§ 30-803. Year's support exempt from debts or execution. The moneys and effects so set apart shall be the absolute property of the widow for said uses, and shall not be taken into the account of the administration of the estate of said intestate, nor seized upon any precept or execution."

"§ 30-805. Year's support given children when no widow surviving. If there be no widow, or she die before the year's support is set apart, the same provision shall be made for the children of the intestate, or of the widow, or of both, under the age of fifteen (15)."

Pursuant to Section 30-802, when a husband dies testate the widow must first dissent from her husband's will before she applies for the widow's support. Section 30-803 gives absolutely to the widow the money and property set apart for her support. The support vests absolutely when the property is set apart. **Bayless v. Bayless**, 44 Tenn. 359 (1867); and **Webb v. Brandon**, 51 Tenn. 285 (1871).

Section 30-805 makes provision for the support of the children when the widow dies before the year's support is set apart. This section makes it clear that if the widow dies before the year's support is set apart, the widow's estate does not have a right to the year's support. Rather, upon the contingency of the widow's death prior to a setting apart of the year's support, a right of support under

certain circumstances inures to the benefit of the minor children.[4] Implicit in this section is the fact the widow has a terminable interest in the year's support until it is set apart.[5]

Significantly, the comparative legislation for Section 30-802 refers to N. Car. Gen. Stat., Section 30-15 and Section 30-20. Prior to the 1961 amendments these two sections provided:

> "§ 30-15. Every widow of an intestate, or of a testator from whose will she has dissented, shall, unless she has forfeited her right thereto as provided by § 52-19 and § 52-20 be entitled, in addition to her distributive share in her husband's personal estate, to an allowance therefrom of the value of $500 for her support for one year after the decease. Such an allowance shall be exempt from any lien by judgment or execution, acquired against the property of the husband."

> "§ 30-20. Upon the application of the widow . . . the personal representative of the deceased shall apply to Justice of the Peace . . . to summon two persons . . . who . . . shall . . . ascertain the person or persons entitled to an allowance . . . and assign to the widow . . . so much thereof as they shall be entitled to by law . . . such assignment shall vest in

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[4] Here it is not argued that the minor children would take under this section, since they are the minor children of a previous marriage and not dependent upon the surviving spouse for their support. **Chapman v. Tipton,** 200 Tenn. 237 (1956).

[5] In **Pope v. Alexander,** 194 Tenn. 146 (1952), the husband died testate on May 8, 1948. Twelve days later the surviving spouse died. One of the questions raised in the case was whether or not the estate of the widow was entitled to a widow's year's support. The Tennessee Supreme Court affirmed the Chancellor by saying that "for obvious reasons" the widow's estate was not entitled to the year's support. The Court, however, did not give the reasons for its holding.

the widow and children such property and the right to collect the debts thus alloted."

The above North Carolina statutes providing for the year's allowance closely resemble the Tennessee support statutes. The North Carolina courts have held that if a widow died before the allotment was confirmed, the right to the widow's allowance did not survive her death. **Cox v. Brown,** 27 N. C. 194 (1844); **In re Mary Dunn,** 63 N. C. 137 (1869); **Simpson v. Currton,** 97 N. C. 116 (1887).

In **Wachovia Bank and Trust Co. v. United States,** *supra,* the widow applied for and was awarded a year's allowance. Holding the widow's allowance did not qualify for the marital deduction since the allowance abated if the surviving widow died before the allowance had been assigned to her, the Court said:

"Under North Carolina General Statutes, Chapter 30, § 16, the administrator is only under a duty to assign the year's allowance upon written application of the widow, signed by her, and within one year from the decedent's death. If these requirements are not met, there is no duty to assign the allowance; therefore, it is terminable. Following the Jackson opinion, the Court holds that the widow's year's allowance herein is not part of the marital deduction."

T. C. A., Section 31-611 is not applicable here, as appellee contends. This section provides:

"§ 31-611. Death of surviving spouse before expiration of time for dissent. Powers of personal representative. In event either the widow or husband die after the death of the spouse-testator and before the time for dissent expires, the personal representative of the widow or husband may, in like manner and every respect, seek the guidance of the court respecting a dissent, with like authority to the court."

Section 31-611 is found in the dower and dissent chapter of the Tennessee Code and does not give the personal representative the right to apply for the widow's allowance. This Section gives the personal representative the right to seek the guidance of the court respecting a dissent, it does not give the personal representative the absolute right to dissent.[6]

This Court finds that under Tennessee law, the widow loses her year's support if she dies prior to the application and setting apart of the allowance, and that under Section 30-803 her rights vest as of the time the property is set apart, and not at the moment of decedent's death. Under **Jackson v. United States**, *supra*, this is a terminable interest and consequently does not qualify for the marital deduction.

The judgment of the District Court will be reversed and the case remanded with instructions to enter judgment for the Appellant.

**6 Tennessee Code Annotated (Official Edition) (1956 and Cum. Supp.):**

TITLE 30.

ADMINISTRATION OF ESTATES.

* * * * * * * *

CHAPTER 8.

ALLOWANCES TO FAMILY.

30-801. **Widow's right to use of certain property until letters granted.**—Where a man shall die intestate, leaving widow, until letters of administration are

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[6] In **Hamilton National Bank v. Haynes**, 180 Tenn. 247 (1943), the Court denied the application to dissent, saying: "The Court is not at all interested in authorizing a dissent from the will for purposes of enriching the estate of such deceased person for the benefit of his or her heirs." See also **Pinkerton v. Truman**, 196 Tenn. 448 (1953).

granted, she may: (1) Take into her possession and care all the personal estate of her deceased husband, and the crop then growing; (2) make use of such part of said crop, and of the provisions on hand, as may be necessary for the support of herself and family; (3) and also use the stock and plantation utensils for the purpose of completing, securing, and selling such crop.

30-802. **Year's support set apart for widow and family.**—Upon the application of the widow of an intestate, or of a widow who dissents from her husband's will, the county court shall appoint three (3) freeholders, unconnected with her either by consanguinity or affinity, who, being first duly sworn to act impartially, shall set apart so much of the crop, stock, provisions, moneys on hand or due, or other assets, as may be necessary for the support of such widow and her family until the expiration of one (1) year after the decease of her husband.

30-803. **Year's support exempt from debts or execution.**—The moneys and effects so set apart shall be the absolute property of the widow for said uses, and shall not be taken into the account of the administration of the estate of said intestate nor seized upon any precept or execution.

30-805. **Year's support given children when no widow surviving.**—If there be no widow, or she die before the year's support is set apart, the same provision shall be made for the children of the intestate, or of the widow, or of both, under the age of eighteen (18).

30-807. **Property exempt from execution.—Exemption vesting in widow for herself and in trust for children.**—The property exempt by law from execution shall, on the death of the husband, be exempt from execution in the hands of, and be vested in, the widow,

without regard to the size or solvency of the estate of the deceased, for herself and in trust for the benefit of the children of the deceased, or of the widow, or of both, and shall not go to the executor or administrator, and, in case there be no widow, and the estate be either solvent or insolvent, such property shall be exempt for the benefit of the minor children under eighteen (18).

**Tennessee Code Annotated:**

30-906. **Application for dower or share—Courts having jurisdiction—County surveyor and appointees to make allotment.**—The surviving spouse may make application to any one of said Courts in the county where the husband or wife, as the case may be, last resided before death, for the appointment of two (2) freeholders or householders of the county, unconnected by affinity or consanguinity with those interested in the estate of the deceased, to allot and set apart, in connection with the county surveyor, or his deputy, to the applicant, dower, or shares, or both, according to law.

30-912. **Homestead set apart before dower out of same lands—Assignment out of proceeds from sale of realty.**—Where a widow is entitled to both homestead and dower out of the same lands, the commissioners shall set apart the homestead first, and then one-third (⅓) of the remainder of such lands as dower, and if the real estate is so situated that the homestead and dower cannot be set apart in kind, as herein provided, then such realty shall be sold, and one thousand dollars ($1,000.00) of the proceeds thereof invested in real estate for the benefit of said widow and minor children, under the direction of the Court having jurisdiction, to be held as homestead subject to the law governing homesteads, and dower shall be assigned out of the residue of said proceeds.

30-916. **Partition suits—Dower to be assigned before decree.**—Whenever heirs or devisees petition for a partition of lands in which the widow is entitled to dower, the dower shall be allotted, upon motion or petition, before the partition is decreed.

30-1614. **Estates which may be divested.**—Where an estate or interest may be divested by the act or omission of the transferee, it shall be taxed as if there were no possibility of divesting.

TITLE 31—DESCENT AND DISTRIBUTION.

* * * * * * *

31-605. **Wife dissenting from will and endowment.**—A widow may dissent from her husband's will:

(1) Where a satisfactory provision in real or personal estate is not made for her, in which case she shall, in writing, signify her dissent in open court, to be entered of record, within nine (9) months after the probate of the will.

(2) Where a provision in personal estate is made for her, but the whole of the husband's property, including the bequest, is taken for the payment of his debts, in which case, without any formal dissent, she may sue for her dower.

And in either case, she shall be endowed and provided for as if her husband dies intestate, and shall be entitled to her distributive share as provided in Sec. 31-606.

31-606. **Distributive share and dower of widow dissenting from husband's will.**—When a husband shall die, leaving a will from which the widow dissents, within the time and in the manner provided by law, and leaving no child, or not more than two (2), his widow shall be entitled to one-third (⅓) part of the personal estate, in addition to her dower in the real

estate. But if the husband leaves more than two (2) children, the widow shall share equally with all the children, she being entitled to a child's part.

31-611. **Death of surviving spouse before expiration of time for dissent—Powers of personal representative.** —In event either the widow or husband die after the death of the spouse-testator and before the time for dissent expires, the personal representative of the widow or husband may, in like manner and every respect, seek the guidance of the Court respecting a dissent, with like authority to the Court.

**Internal Revenue Code of 1954:**

Sec. 2056. Bequests, etc., to Surviving Spouse.

(a) **Allowance of Marital Deduction.**—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse,

* * *

(b) **Limitation in the Case of Life Estate or Other Terminable Interest.**—

(1) **General rule.**—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

* * * * * * * *

(e) **Definition.**—For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if—

(1) such interest is bequeathed or devised to such person by the decedent;

(2) such interest is inherited by such person from the decedent;

(3) such interest is the dower or courtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent;

* * * * * * * *

(26 U. S. C., 1958 ed., Sec. 2056.)

**Treasury Regulations on Estate Tax (1954 Code):**

Sec. 20.2056 (a)-1. **Marital deduction; in general.**

(a) A deduction is allowed under section 2056 from the gross estate of a decedent who was a citizen or resident of the United States at the time of his death for the value of any property interest which passed from the decedent to his surviving spouse, if the interest is a "deductible interest" as defined in Section 20.2056 (a)-2, * * *. * * *

* * * * * * * *

(26 C. F. R., Sec. 20.2056 (a)-1.)

Sec. 20.2056 (a)-2. **Marital deduction; "deductible interests" and "nondeductible interests."**

(a) Property interests which passed from a decedent to his surviving spouse fall within two general

categories: (1) Those with respect to which the marital deduction is authorized, and (2) those with respect to which the marital deduction is not authorized. These categories are referred to in this section and other sections of the regulations under section 2056 as "deductible interests" and "nondeductible interests," respectively (see paragraph (b) of this section). * * *

(b) An interest passing to a decedent's surviving spouse is a "deductible interest" if it does not fall within one of the following categories of "nondeductible interests":

* * * * * * *

(4) A property interest passing to a decedent's surviving spouse which is a "terminable interest," as defined in Section 20.2056 (b)-1, is a "nondeductible interest" to the extent specified in that section.

(26 C. F. R., Sec. 20.2056 (a)-2.)

Sec. 20.2056 (b)-1. **Marital deduction; limitation in case of life estate or other "terminable interest."**

(a) **In general.** Section 2056 (b) provides that no marital deduction is allowed with respect to certain property interests, referred to generally as "terminable interests," passing from a decedent to his surviving spouse. The phrase "terminable interest" is defined in paragraph (b) of this section. However, the fact that an interest in property passing to a decedent's surviving spouse is a "terminable interest" makes it nondeductible only (1) under the circumstances described in paragraph (c) of this section, * * *.

(b) "**Terminable interests.**" A "**terminable interest**" in property is an interest which will terminate or fail on the lapse of time or on the occurrence or the failure to occur of some contingency. Life estates * * * are therefore terminable interests. * * *

(c) **Nondeductible terminable interests.** (1) A property interest which constitutes a terminable interest, as defined in paragraph (b) of this section, is nondeductible if—

(i) Another interest in the same property passed from the decedent to some other person for less than an adequate and full consideration in money or moneys worth, and

(ii) By reason of its passing, the other person or his heirs or assigns may possess or enjoy any part of the property after the termination or failure of the spouse's interest.

* * * * * * * *

(g) **Examples.** The application of this section may be illustrated by the following examples, in each of which it is assumed that the property interest which passed from the decedent to a person other than his surviving spouse did not pass for an adequate and full consideration in money or money's worth:

* * * * * * * *

**Example (8).** Assume that pursuant to local law an allowance for support is payable to the decedent's surviving spouse during the period of the administration of the decedent's estate, but that upon her death or remarriage during such period her right to any further allowance will terminate. Assume further that the surviving spouse is sole beneficiary of the decedent's estate. Under such circumstances, the allowance constitutes a deductible interest since any part of the allowance not receivable by the surviving spouse during her lifetime will pass to her estate under the terms of the decedent's will. If, in this example, the decedent bequeathed only one-third of his residuary estate to his surviving spouse, then

two-thirds of the allowance for support would constitute a nondeductible terminable interest.

(26 C. F. R., Sec. 20.2056 (b)-1).

* * * * * * *

Sec. 20.2056 (e)-2 **Marital deduction; definition of "passed from the decedent to his surviving spouse."**

**(a) In general.** In general, the definition stated in Section 20.2056 (e)-1 is applicable in determining the property interests which "passed from the decedent to his surviving spouse." Special rules are provided, however, for the following:

* * * * * * *

An allowance or award paid to a surviving spouse pursuant to local law for her support during the administration of the decedent's estate constitutes a property interest passing from the decedent to his surviving spouse. In determining whether or not such an interest is deductible, however, see generally the terminable interest rules of section 20.2056 (b)-1 and especially example (8) of paragraph (g) of that section.

* * * * * * *

(26 C. F. R., Sec. 20.2056 (e)-2).

Sec. 20.2056 (e)-3 **Marital deduction; definition of "passed from the decedent to a person other than his surviving spouse."**

The expression "passed from the decedent to a person other than his surviving spouse" refers to any property interest which, under the definition stated in Section 20.2056 (e)-1 is considered as having "passed from the decedent" and which under the rules referred to in Section 20.2056 (e)-2 is not considered as having "passed from the decedent to his

surviving spouse." * * * Whether or not there is a possibility that the "person other than his surviving spouse" (or the heirs or assigns of such person) may possess or enjoy the property following termination or failure of the interest therein which passed from the decedent to his surviving spouse is to be determined as of the time of the decedent's death.
(26 C. F. R., Sec. 20.2056 (e)-3.)

# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1032

HAMILTON NATIONAL BANK OF KNOXVILLE, EXECUTOR OF THE ESTATE OF JOHN EDD BRADLEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case presents the question whether, under Tennessee law, a widow's interest in a statutory year's support constitutes a "terminable interest" within the purview of Section 2056(b)(1) of the 1954 Internal Revenue Code, so that her deceased husband's estate is not entitled to an estate tax marital deduction for an amount paid as support. Applying the rule established by this Court in *Jackson* v. *United States,* 376 U.S. 503, the court below properly held that under Tennessee law a widow's support interest is a non-deductible "terminable interest."



214-976—66

In the *Jackson* case this Court held that whether a widow's allowance constitutes a "terminable interest" under the predecessor of § 2056(b)(1) must be determined as of "the date of death of the testator" (p. 508). In the instant case, as in *Jackson,* it was impossible to predict at the time of decedent's death whether his widow would eventually receive any support payments. In order for a widow to receive a year's support under Tennessee law she must file a formal dissent from her deceased husband's will and apply to the county court for widow's support; the court then appoints three freeholders to set aside personal property of the deceased husband and reviews their report.[1] As the lower court found, "if the widow dies before the year's support is set apart, the widow's estate does not have a right to the year's support" (Pet. 16).[2] Therefore, at the time of the decedent's death, his widow's claim for support was a conditional and terminable interest within the meaning of § 2056(b)(1).[3]

The principal question presented by the petition is one of Tennessee law, having no national importance. The decision below is correct; there is no conflict of decisions and no reason for this Court to review the

[1] See, *e.g.*, *International Baking Co.* v. *Polk*, 155 Tenn. 461, 465, 295 S.W. 472, 473; *Bayless* v. *Bayless*, 44 Tenn. 359, 363.

[2] See *Pope* v. *Alexander*, 194 Tenn. 146, 250 S.W. 2d 51.

[3] The estate is not entitled to a marital deduction merely because, more than a year after decedent's death, his widow did in fact receive $8,400. As this Court recognized in *Jackson*, "there is no provision in the Code for deducting all terminable interests which become nonterminable" (p. 509).

decision. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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